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No. 89-624

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MAISLIN INDUSTRIES, U.S., INC., *et al.*,
Petitioners,

v.

PRIMARY STEEL, INC.,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

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41pd

QUESTION PRESENTED FOR REVIEW

In an action by a motor common carrier subject to the provisions of the Interstate Commerce Act to recover its lawful tariff charges, does a shipper have a legal defense that it is entitled to a non-tariff rate which differs from the carrier's published rates filed with the Interstate Commerce Commission, where the ICC advises a court that collection of the applicable and lawful tariff charges would be unreasonable?

PARTIES TO THE PROCEEDING BELOW

Appellants in the court below were Maislin Industries, U.S., Inc., and its subsidiary operating companies, viz., Gateway Transportation, Inc., Quinn Freight Lines, Inc., Richmond Cartage Corporation, MI Acquisition Corporation, and Maislin Transport of Delaware, Inc.

Appellee in the court below was Primary Steel, Inc. The Interstate Commerce Commission was permitted to intervene as a party to the proceeding in support of appellee.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 879 F.2d 400 (1989). It appears in the Appendix to the Petition for Writ of Certiorari at 1a-13a.

The memorandum and order of the United States District Court for the Western District of Missouri is reported at 705 F.Supp. 1401 (1988). It appears in the Appendix to the Petition at 14a-27a.

The opinion of the Interstate Commerce Commission relied upon by the district court and court of

appeals was issued in Docket No. MC-C-10961, *Primary Steel, Inc.* v. *Maislin Industries, U.S., Inc.* Its unreported decision appears in the Appendix to the Petition at 28a-44a.

GROUNDS FOR THIS COURT'S JURISDICTION

The judgment of the court of appeals was entered on July 17, 1989, affirming the district court's judgment filed on July 22, 1988. No petitions for rehearing were filed. Pursuant to Section 1254(1) of Title 28 of the United States Code, the Petition for Writ of Certiorari was filed October 16, 1989, and certiorari was granted January 16, 1990.

STATUTES INVOLVED

Section 10701(a) of the Interstate Commerce Act, 49 U.S.C. § 10701(a) provides in relevant part:

> A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable.

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. § 10761(a) provides:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier

> may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

STATEMENT OF THE CASE

This case arises from an action filed pursuant to 49 U.S.C. § 11706(a) to recover freight rate undercharges for interstate transportation services performed by Quinn Freight Lines, Inc., a subsidiary operating company of Maislin Industries, U.S., Inc. Quinn was a common carrier certificated by the ICC to engage in the transportation of property by motor vehicle in interstate and foreign commerce. Its rates, charges, rules, and regulations governing its services were maintained in published tariffs on file with the ICC. From January 1981 through mid-1983, Quinn transported 1,081 shipments for Primary Steel, Inc., a shipper of various steel products. Throughout this period, Quinn billed and Primary paid transportation charges which were less than the charges prescribed by Quinn's filed tariffs. (Pet. App. 29a-32a).[1]

On July 14, 1983, Maislin Industries and its operating divisions filed petitions in bankruptcy. A post-petition audit of the debtors' accounts determined that Quinn had undercharged Primary by $187,923.36 on the subject shipments. Thereafter, the duly appointed agents of the bankrupt estate acting pursuant to au-

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[1] "Pet.App." refers to the appendices to the printed Petition for Writ of Certiorari filed October 16, 1989. "JA" refers to the printed Joint Appendix filed herewith.

thorization of the bankruptcy court issued balance due bills to the shipper for the undercharges representing the difference between the amounts previously billed and paid and the amounts prescribed by the tariffs on file with the ICC. Upon Primary's refusal to pay the amounts demanded, the Maislin estate brought suit in the district court to recover undercharges and prejudgment interest. Primary defended on the ground that no additional amounts were due because the parties had agreed to the charges already paid. It argued that even though the rates paid were not published in a tariff, it would be unreasonable to permit the collection of the higher filed tariff charges. At the shipper's request, the district court, by order filed September 3, 1985, stayed the proceeding and referred the matter to the ICC for a determination of (1) whether the asserted tariffs were applicable to the involved shipments, (2) whether the tariff rates were reasonable, and (3) whether assessing and rebilling for tariff rates higher than those agreed upon was an unreasonable practice. (JA 7, JA 8). The court noted that referral was appropriate because the ICC was considering adoption of a general policy addressing negotiated, unpublished rates. (JA 8).

While the referred administrative proceeding was pending, the ICC issued a policy statement in Ex Parte No. MC-177, *Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) (*Negotiated Rates*). (JA 11). That proceeding was instituted at the request of shipper associations whose members were receiving balance due bills from various bankrupt carrier estates for the payment of lawful but unpaid tariff charges. Following public comment, the ICC concluded that it could not lawfully adopt a rule declaring

an unfiled, negotiated rate the maximum that could be collected in undercharge litigation. (JA 15-JA 16). Nevertheless, it reasoned that the so-called filed rate doctrine had outlived its usefulness in the pro-competitive atmosphere brought about by the Motor Carrier Act of 1980, Pub.L. 96-296, 94 Stat. 793, July 1, 1980, and that the filed tariff concept should no longer preclude consideration of equitable defenses. (JA 19-JA 21). The Commission recognized, however, that it is without authority to waive motor carrier undercharges or, in the absence of court referral, entertain a proceeding involving rates on past shipments. (JA 16). Therefore, it offered to render advisory opinions to referring courts in which it would consider all the circumstances in a given case and advise the court whether an unfiled negotiated rate or the lawful tariff rate should apply. The Commission conceded that the referring court could accept or reject such opinions. (JA 22).[2]

The record before the ICC in the referred Primary proceeding was developed through the submission of written verified statements.[3] On January 19, 1988, the ICC issued its opinion that the parties had negotiated a rate which although not published and filed with the ICC was the rate billed by Quinn and paid

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[2] About two and one half years later, the ICC reversed its position and declared that its opinions are not advisory, but are final and binding on the courts. *Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989). This statement of self-anointed jurisdiction was not before the court below, but, in view of the court's conclusions, it would not have affected the outcome.

[3] The administrative record was filed with the district court as part of defendant's motion for summary judgment and is contained in the record on appeal to the court below.

by Primary. (Pet.App. 36a-40a). It observed that although no showing had been made that Quinn intended to engage in unlawful conduct, it nevertheless failed to "legalize the quoted rates". (Pet.App. 42a). The Commission concluded that it would be an unreasonable practice to require payment of the lawful tariff charges. (Pet.App. 44a). The tariff rates were not determined to be inapplicable nor unreasonable although the parties submitted evidence on these issues. The failure to so rule was not challenged before the Commission or the referring court.

Ruling on cross-motions for summary judgment, the district court found that the ICC determination was a matter within its primary jurisdiction and entitled to deference. (Pet.App. 17a-19a). Concluding that the ICC's recognition of equitable defenses was consistent with the law and its findings were supported by substantial evidence, the court affirmed the ICC determination that collection of the tariff charges would be an unreasonable practice. (Pet.App. 25a). In light of these conclusions, the district court did not address Maislin's request for prejudgment interest. Judgment was entered for Primary. (Pet.App. 27a).

On August 19, 1988, Maislin filed its notice of appeal. The ICC was permitted to intervene in support of defendant and the case was duly briefed, argued and submitted for decision to a three judge panel. On July 17, 1989, the court issued its opinion affirming the judgment and conclusions of the district court that the issue considered is within the ICC's primary jurisdiction (Pet.App. 5a-7a) and that equitable defenses may be properly considered. (Pet.App. 9a-11a). The court found it unnecessary to address

Maislin's request for prejudgment interest. (Pet.App. 12a-13a).

SUMMARY OF ARGUMENT

Since its inception the Interstate Commerce Act has required that common carriers collect and shippers pay only the filed tariff rate. This Court has repeatedly held that the overriding purpose of the Act could not be achieved if carriers and shippers could secretly agree to rates different from those contained in a tariff. As a result, both intentional and mistaken departures from the filed rate have been strictly prohibited as a defense in actions to recover common carrier tariff charges. To ensure the integrity of its regulatory scheme, Congress imposed civil and criminal penalties on carriers and shippers for failure to adhere to the published tariff. The Act's punitive and remedial provisions are deliberate in design to compensate the public injury for departures from lawful rates. Manifestly, a private remedy having the effect of supplanting a lawful, effective tariff with a non-tariff rate would completely undo the statute.

The facts of this case do not differ in substance from those in which the courts have repeatedly held that the statute absolutely bars equitable claims or defenses based on so-called negotiated rates. The difference here is that the ICC, the agency charged with enforcing the Act, has declared that the tariff adherence requirements of the statute are unreasonable where the parties have negotiated a rate in conflict with the tariff. However, the filed rate doctrine is a creature of statute, not ICC policy, and Congress has not given the Commission or the courts discretion in

relieving motor common carriers and shippers from these requirements.

The court of appeals recognized that courts cannot give legal effect to an illegal rate. Nonetheless, it attempted to create a remedy by resorting to the doctrine of primary jurisdiction under which only the ICC may determine the reasonableness of a carrier practice, and impermissibly allowed that determination to give rise to an equitable defense. This Court has held, however, that primary jurisdiction cannot be employed to create a legal remedy where none exists. The ICC has no authority to waive motor carrier undercharges on the basis of a practice or otherwise and the statute precludes the courts from recognizing equitable defenses to their collection. Yet, acting in concert, the court of appeals and the ICC accomplished a result which neither could bring about independently.

The unambiguous language of the Act does not authorize a statutory remedy which entitles a shipper to enforce a non-tariff rate. In view of the Act's various provisions dependent on the filed rate doctrine, any claim to a rate other than the filed rate is absolutely inconsistent with the statute.

Congress has provided a comprehensive scheme of rate regulation and has seen fit in limited and narrow circumstances to specifically define instances where the filed rate provisions are not applicable. By the same token, the tariff adherence requirements of the statute have not been changed in relevant part, even after Congress' thorough review preceding enactment of the Motor Carrier Act of 1980. To infer an intent to eliminate such a requirement is to ignore the plain

language of the statute. If a change is to be made, it must come from Congress.

ARGUMENT

A. The Filed Rate Doctrine Precludes Recognition Of Non-Tariff Rates As A Matter Of Law

The issue presented and the pertinent facts are relatively simple. The current undercharge litigation involves the following common facts: an incorrect billing by the carrier at below tariff rates resulting from an agreement of the parties or an erroneous rate quotation by the carrier, the failure to publish and file those rates with the ICC, and the subsequent rebilling, typically by a bankrupt estate, at the applicable tariff rate.[4] Simply put, the question is whether the shipper has a legal right to the non-tariff rate.

The touchstone of the controversy lies in 49 U.S.C. § 10761(a), which, like its predecessor sections, require that common carriers collect and shippers pay only the filed tariff rate. This mandate forms the basis of the filed rate doctrine. In *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the Court held that the Interstate Commerce Act extinguished any common law right to a reasonable rate and substituted therefor a right to whatever rate was duly filed with the ICC, unless that rate is determined to be unreasonable or discriminatory. The Act's fundamental nondiscriminatory purposes could not be achieved absent tariff filing and adherence require-

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[4] It is more than coincidental that carriers such as Quinn who were willing to offer deep discounts from their tariff rates are no longer operating.

ments. As explained in *Armour Packing Co.* v. *United States*, 209 U.S. 56, 28 S.Ct. 428, 435 (1908), "If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart."

Equitable defenses to collection of the filed tariff rate such as here involved are of necessity barred by the statute. Thus, in *Louisville & N. R. R. Co.* v. *Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 495 (1915), the Court stated:

> Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

The harsh realities of this doctrine have been repeated by the Court on numerous occasions since that time[5] and through its most recent pronouncement in

[5] See, e.g., *Louisville & N.R.R.* v. *Central Iron & Coal*, 265 U.S. 59, 65 (1924); *Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478, 484-5 (1939); *Southern Pacific Transportation Co., Inc.* v. *Commercial Metals Co.*, 456 U.S. 336, 343-4 (1982); and *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983).

1986 in *Square D Company* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), where the Court, quoting from Justice Brandeis' opinion in *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922), held:

> Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. [citations omitted]. 476 U.S. 416-417.

The tariff rates involved here were not found to be unreasonable and therefore are "the duly submitted, lawful rates under the Interstate Commerce Act. . . ." *Id.*, 476 U.S. at 417.

The tariff filing and adherence requirements are "utterly central" to the Act. *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379 (D.C. Cir. 1986). They are the linchpin of federal rate regulation without which much of the remainder of the Act would be unenforceable and unnecessary. There would, for example, be no way to enforce the requirement that rates be just and reasonable, 49 U.S.C. § 10701(a), or the prohibition against discrimination, 49 U.S.C. § 10741(b). The penal provisions of 49 U.S.C. §§ 11902 and 11903 (formerly the Elkins Act, 49 U.S.C. § 41), 11904 and 11916 would be nul-

lified. The basis for the antitrust immunity afforded by 49 U.S.C. § 10706(b) authorizing motor common carriers to collectively formulate and maintain published rates would be nonexistent. Shippers could not challenge rates before they became effective, 49 U.S.C. § 10708(a)(1), or after, 49 U.S.C. §§ 10704(b), 11705(b)(3), and could not recover an overcharge, 49 U.S.C. § 11705(b)(1).

It is thus apparent that the Act is intentional in design in prohibiting exceptions to the filed rate doctrine. In the absence of a specific exception, the statute cannot be construed to simultaneously require the filing of rates in a tariff, while condoning noncompliance with that requirement.

B. The ICC Opinion Does Not Make Viable A Statutory Equitable Defense

To avoid *Maxwell* and its progeny, the court of appeals engaged in a procedural improvisation. Cognizant that courts may not recognize equitable defenses, *Seaboard System R.R., Inc.* v. *United States*, 794 F.2d 635 (11th Cir. 1986), the court resorted instead to the doctrine of primary jurisdiction to circumvent this prohibition. Finding that the ICC has primary jurisdiction to determine the reasonableness of carrier practices under 49 U.S.C. § 10701(a), the court employed that determination to excuse the requirements of Section 10761(a). However, proper resolution of the issue presented does not require resort to this doctrine at all. The question does not involve whether the ICC has jurisdiction to determine the unreasonableness of a practice.[6] Rather, the threshold question

[6] The asserted "practice" is the enforcement of a lawful tariff,

is whether there exists a legally cognizable right to a non-tariff rate. If the remedy does not exist, primary jurisdiction cannot be implicated to create one.

The effect of the concerted actions of the court and the ICC was to create a remedy where none independently exists in either the courts or the ICC. This procedural device was held to be impermissible in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951) and *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959). *Montana-Dakota* was a suit in a federal court by Montana, a purchaser of electricity from Northwestern, at rates filed with the Federal Power Commission under the Federal Power Act. The gravamen of the complaint was that the rates violated the Act in that they were unreasonably high, that Northwestern had misled the FPC into accepting the rates, that the rates had therefore been improperly established, and that Northwestern had fraudulently prevented Montana from seeking redress from the Commission while the rates were in effect. Applying the filed rate doctrine, the Court held that the complaint failed to state a cause of action, for the reason that one "can claim no rate as a legal right that is other than the filed rate, . . . and not even a court can authorize com-

a statutory mandate which the ICC has no jurisdiction to declare unlawful. The use of the phrase "carrier practice" has been cleverly employed by shippers and the ICC to call into play primary jurisdiction because it is a term used in the statute. Mere labelling conduct as a practice does not bring it within agency primary jurisdiction. *Nader* v. *Allegheny Airlines*, 426 U.S. 290, 304 (1976) (doctrine is appropriate where there is "a question of the validity of a rate or practice *included in a tariff filed with an agency*"). (Emphasis supplied).

merce in the commodity on other terms." 341 U.S. at 251.

Dealing with a dissenting opinion that the issue of rate reasonableness could be referred to the FPC, the Court noted that referral of particular issues to an administrative agency might be appropriate where the plaintiff "concededly stated a federally cognizable cause of action, to which the referred issue was subsidiary." 341 U.S. at 253. However, under the filed rate doctrine a plaintiff has no cause of action for damages grounded on a claim that he has a right to a rate other than the filed rate. Hence, Montana's claim that, but for the fraud alleged, it would have paid a lower rate failed to state a cause of action.

In *T.I.M.E.*, motor carriers sued the United states, *qua* shipper, to collect freight charges. The government defended on the ground that the rates upon which they were computed were unjust and unreasonable. The district court granted summary judgment to the carriers, but the court of appeals reversed on the ground that the government was entitled to an ICC determination of the reasonableness of the tariff rates, notwithstanding the ICC's inability to award reparations on motor carrier rates for past shipments. Relying on *Montana-Dakota*, the Court reversed, holding that the Motor Carrier Act did not "give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, or to enable them to assert 'unreasonableness' as a defense in carrier suits to recover applicable tariff rates." 359 U.S. at 470.

As here, it was asserted that a statutory cause of action or defense existed by virtue of the language in former Section 216(b) of the Act (the predecessor

to present Section 10701(a)) requiring that rates, and, as here pertinent, practices be reasonable. The Court held, however, that the statutory duty to establish and observe reasonable rates and practices creates only a "criterion for administrative application in determining a lawful rate" rather than a "justiciable legal right." 359 U.S. at 469. Thus, the general requirement imposed on carriers to observe reasonable practices under Section 10701(a) does not provide shippers a cause of action or defense for a violation of that duty.

The Court also addressed the contention that the Motor Carrier Act preserved a pre-existing common law right to a reasonable rate. Relying on *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co., supra*, it concluded that under the statutory scheme only the ICC could determine the reasonableness of a rate and therefore any common law right was necessarily extinguished as "absolutely inconsistent" with the statute. 359 U.S. at 473. Nevertheless, the government urged that such a remedy would be consistent with the statute when coupled with referral to the ICC for a determination of the reasonableness issue as an adjunct to a judicial proceeding. The Court rejected this contention stating:

> To permit a utilization of the procedure here sought by the Government would be to engage in the very "improvisation" against which this Court cautioned in Montana-Dakota, supra, in order to permit the I.C.C. to accomplish indirectly what Congress has not chosen to give it the authority to accomplish directly. In the absence of the clearest indication that Congress intended that the Mo-

> tor Carrier Act should preserve rights which could be vindicated only by such an improvisation, we must decline to consider a defense which involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide. * * * * [footnote and citation omitted]. 359 U.S. at 475.

Even assuming ICC primary jurisdiction over the practices asserted here, the Commission is without independent authority to waive motor carrier undercharges or the requirements of Section 10761(a), and the courts may not declare unreasonable the enforcement of the tariff on the basis of negotiated unfiled rates. The combined rulings below achieve precisely this forbidden result.

Nevertheless, the court believed support for its rationale existed in *Seaboard System R. R., Inc., supra.* (Pet.App. 8a). However, it failed to recognize critical jurisdictional differences which render *Seaboard* inapposite. At issue in *Seaboard* was an ICC decision[7] ordering the waiver of railroad undercharges subsequent to and independently of the rail carrier's civil action to recover tariff undercharges. While the suit was pending, the shipper filed an administrative complaint for a formal determination by the ICC that no undercharges were due in view of the confusing nature of two different lawfully filed tariff provisions. In this posture, the subtle but substantive statutory jurisdictional distinctions between ICC rail and motor carrier rate regulation become apparent.

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[7] *Buckeye Cellulose Corp.* v. *Louisville & Nashville R.R. Co.*, 1 I.C.C.2d 767 (1985).

Rail carriers are liable for damages resulting from acts or omissions in violation of the Act. 49 U.S.C. § 11705(b)(2). Liability may be enforced by court action or filing a complaint with the ICC. 49 U.S.C. § 11705(c)(1). The Commission may order a rail carrier to pay damages, 49 U.S.C. § 11705(c)(2), which order is enforceable by a private civil action. 49 U.S.C. § 11705(d)(1). The Commission may also order the carrier to stop a violation. 49 U.S.C. § 10704(a)(1). Thus, the ICC order under review in *Seaboard* was issued pursuant to specific statutory powers and was self executing. The Commission's independent jurisdiction to order waiver of undercharges was not in question. Rather, the reviewing court was called upon to determine whether the order was contrary to law.[8]

In contrast, the ICC has no similar authority over motor carrier rates on past shipments. Jurisdiction is vested exclusively in the courts. 49 U.S.C. § 11706. Of course, Section 10701(a) confers no enforcement power. Assuming, *arguendo*, the involvement of motor carrier practices, the ICC's authority is found in 49 U.S.C. § 10704(b)(1),[9] which is limited to future prescription. Therefore, while the ICC may order a motor carrier to publish and charge its tariff rates in the future, it cannot waive collection of tariff charges

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[8] In *Seaboard* both the ICC and court decisions were couched in terms of the Commission's authority over unreasonable practices. However, the ultimate issue involved the applicability of tariff provisions lawfully on file. It did not concern an unfiled rate. *Seaboard* is therefore factually distinguishable as well.

[9] In purporting to uphold the ICC's practices jurisdiction over motor carriers, the court of appeals erroneously relied on Section 10704(a)(1), which is limited in its application to rail, rail-water, express, and pipeline carrier transportation. (Pet.App. 3a).

accrued in the past. Unlike the order in *Seaboard*, the ICC's unreasonable practice finding here was not enforceable. For that matter, the ICC's opinion is simultaneously superfluous and beyond its jurisdiction. By the same token, the Act gives the Commission no power to waive or declare unreasonable the requirements of Section 10761(a). The Commission's findings therefore have no substantive effect.

C. The Statutory Reparations Remedy Did Not Create An Equitable Defense

The holding in *T.I.M.E.* left purchasers of motor common carriage without any remedy whatever with respect to unreasonable rates on past shipments. Three years later, the Court explained that ruling in *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962), holding that a shipper's common law damage claim for a motor carrier's misrouting practice was not extinguished by the Act. In that case, a shipper filed a civil action to recover the difference in rate charges resulting from the carrier's routing of intrastate shipments over its interstate routes at higher rates than those applicable to its intrastate routes. The action was stayed and the ICC subsequently determined that such routing was unjustified and unreasonable.[10] The district court dismissed the complaint on the basis of *T.I.M.E.*, and the court of appeals affirmed. This Court reversed and held that such action was not extinguished because the remedy sought was consistent with the statutory scheme.

In distinguishing *T.I.M.E.*, the Court emphasized that the focal issue was "not one of rates but of

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[10] *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 302 I.C.C. 173 (1957).

routes." 371 U.S. at 87. Indeed, no challenge was made against either of the carrier's admittedly lawful tariffs. The Court concluded that a misrouting remedy was not repugnant to the statutory scheme because, unlike rates, the statute did not preempt rights and liabilities with respect to motor carrier routing. Thus, the Court observed that the Act did not afford shippers a right to select routes, and did not provide procedures to challenge routing practices in advance of shipment. *Id.* at 87. Moreover, the absence of a judicial remedy placed the shipper entirely at the mercy of the carrier contrary to the overriding purposes of the Act. *Id.* at 88. Critical to the Court's conclusion was its determination that allowance of a remedy for misrouting, unlike a remedy for rate reasonableness, would not jeopardize the stability of tariffs or of certificated routes or otherwise hamper efficient administration of the Act. *Id. Hewitt-Robins*, therefore, neither narrowed nor altered the ruling in *T.I.M.E.*

Following the Court's decisions, various legislative proposals were introduced in the 87th, 88th and 89th Congresses to provide a statutory remedy for the situations addressed in *T.I.M.E.* and *Hewitt-Robins*. Congress responded with the enactment of Pub.L. 89-170, 79 Stat. 651, September 6, 1965. That legislation created the rate reasonableness remedy found lacking in *T.I.M.E.*, but declined to adopt a *Hewitt-Robins* type remedy for other violations of the Act. The law amended then Section 204a of the Act to provide a cause of action against motor carriers for the recovery of "reparations", defined as "damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as pro-

vided in Section 216(e) of this part, . . . finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial." Former Section 204a(2) and (5).[11]

The statute unambiguously limits the recovery of reparations to proceedings in which the ICC finds the rates contained in a tariff to be unlawful under prescribed statutory criteria. The recodified language of Section 11705(b)(3) omits the reparations definition, but likewise limits the remedy to the "imposition of rates . . . the Commission finds to be in violation of [the Interstate Commerce Act]." This narrow remedy does not provide a cause of action or defense for other statutory violations. In this context, the Motor Carrier Act is in stark contrast with the provisions of the Act dealing with rail and water carriers (former Parts I and III, respectively) which impose liability for damages resulting from "an act or omission of that carrier in violation of [the Act]." 49 U.S.C. § 11705(b)(2). The distinction is critical. As the Court observed in *T.I.M.E.*:

> To hold that the Motor Carrier Act nevertheless gives shippers a right of reparation

[11] The Interstate Commerce Act was recodified in 1978. See Pub. L. 95-473, 92 Stat. 1337, October 17, 1978. The pertinent provisions of former Section 204a, 49 U.S.C. § 304a, now appear in 49 U.S.C. § 11705(b)(3) and § 11706(c)(2). The recodification effected no change in substance and none was intended. See House Report No. 95-1395, dated July 26, 1978, at pages 8, 9, reprinted in 1978 U.S. Code Cong. & Admin. News, pp. 3016-3018. Examination of the prior language is required to determine the intent of Congress. *Trailer Marine Transport Corp.* v. *Federal Maritime Commission*, 602 F.2d 379, at 383, n. 18 (D.C. Cir. 1979).

> with respect to allegedly unreasonable past filed tariff rates would require a complete disregard of these significant omissions in Part II of the very provisions which establish and implement a similar right as against rail carriers in Part I. We find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I were wholly omitted in the Motor Carrier Act. 359 U.S. at 471.

The plain language of the statute establishes that the reparations remedy against motor carriers is much narrower than that available against rail and water carriers. Cf. *Seaboard*, *supra*.

The legislative history of Pub.L. 89-170 confirms that this distinction in treatment was intentional. While Congress had several bills before it[12] covering similar subject matter, it is important to contrast H.R. 5401 which became law with H.R. 5869 which did not. The latter bill was favored by shippers, the government, and the ICC and would have amended Section 204a(a) to provide:

> In case any common carrier by motor vehicle subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such carrier shall be liable to the person or persons injured thereby for

[12] H.R. 5250, H.R. 5396, H.R. 5398, H.R. 5869, H.R. 5401, and S. 1727, S. 1732.

> the full amount of damages sustained in consequence of any such violation . . . .[13]

Congress was well aware that H.R. 5401 provided a substantially narrower remedy than that proposed by H.R. 5869. Nevertheless, as stated in the House Report on H.R. 5401, "[t]he committee further resolved the suggestions as to reparations by adopting sections 6 and 7 of H.R. 5401 rather than the provisions of H.R. 5869."[14]

Both the Commission and the government favored adoption of H.R. 5869 to make uniform the remedies against all carriers regulated by the Act.[15] Both also acknowledged the distinctions between the proposed and enacted bills. Thus, in commenting on the difference in S. 1727 (the counterpart to H.R. 5401) and S. 1732 (the counterpart to H.R. 5869), the United States Comptroller General stated:

> We note that the provisions in S. 1727 are considerably abbreviated as compared to those in S. 1732, a bill which proposes detailed and specific provisions to permit the recovery of damages for violations of parts II and IV; S. 1727 defines "reparations" and authorizes recovery of such reparations rather than "damages" for violations, as in related sections of the Interstate Commerce

[13] Hearings before House Committee on Interstate and Foreign Commerce on H.R. 5401, 89th Cong., 1st Sess., at page 14 (March 23-25, 1965).

[14] House Report, (Interstate and Foreign Commerce Committee), No. 253, April 22, 1965, reprinted in 1965 U.S. Code Cong. & Admin. News, p. 2927.

[15] *Id.*, pp. 2936-2941.

> Act covering rail and water carriers. Our support for S. 1732 is reflected in our letter to you on April 22, 1965, B-120670.

The ICC likewise later explained that it would have preferred equal treatment of all modes of transportation. Addressing its limited jurisdiction in motor carrier reparations matters under the 1965 law, it observed, "[w]hile in the opinion of the Commission uniformity with respect to procedure for handling reparations under parts I, II, III, and IV of the act would have been desirable, Congress elected to provide otherwise." *Informal Procedure for Determining Reparation*, 335 I.C.C. 403, 413 (1969).

The letter and intent of the reparations remedy provided by Pub. L. 89-170 was plainly limited to actions for unreasonable rates and specifically excluded actions for other violations of the Act. As stated in the House Report, the legislation "would restore *a* procedure formerly available to shippers which was set aside by the Supreme Court in 1959 by its decision in the *T.I.M.E.* case . . . and would not affect in any way the right of shippers to recover damages for misrouting under the Hewitt-Robins doctrine" (Emphasis added; citations omitted).[16] *T.I.M.E.* therefore continues to stand for the proposition that the Act does not provide a defense to recovery of the lawful rate on the ground that the carrier violated its duty to observe reasonable practices.

The ICC's unreasonable practice finding was not the equivalent of a determination that Quinn's tariff rates were unreasonable which the Commission de-

[16] See House Rep. No. 253, reprinted in 1965 U.S. Code Cong. & Admin. News, p. 2931.

clined to make. The zone of rate reasonableness for motor carriers is governed by the statutory criteria set forth in Section 10701(e) of the Act. A filed rate not found unreasonable is the legal and lawful rate. That another rate may exist, albeit negotiated and illegal, which the ICC finds applicable is not determinative of whether the filed rate is within the zone of reasonableness.[17] In essence, the Commission found that an applicable, effective, and lawful rate cannot be collected. Such a finding has no statutory source.

D. A Remedy Giving Effect To Negotiated Rates Is Absolutely Inconsistent With The Statute

A remaining consideration is whether the equitable negotiated rates defense to the application of filed rates can exist outside of but consistent with the Act as in *Hewitt-Robbins, supra*. Whether such a claim survived enactment of the Motor Carrier Act depends on the effect of the exercise of the remedy upon the statutory scheme of regulation. 371 U.S. 89.

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[17] Compare *Ia. Power & Light Co.* v. *Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981), upholding the ICC's prescription of a rate that was the same as a negotiated contract rate. In the Commission proceeding the carrier's costs and other factors, including the agreed rates, were considered in assessing the reasonableness of the proposed rail rate before it became effective in a filed tariff. On the weight to be given the negotiated contract rate, the ICC said ". . . once a tariff becomes legally effective, the shipper has no judicial or other remedy for the carrier's repudiation of its [contract rate] agreement, even if the shipper substantially relied on it." *Unit Train Rates on Coal-Burlington Northern, Inc.*, 364 I.C.C. 186, 197 (1980). Of further note is the fact that the contract rate had been filed and permitted to become effective pending the Commission's investigation of the propsoed rate. *Id.* at 191.

There can be no serious question that a claim to a rate other than the filed rate is absolutely inconsistent with and necessarily extinguished by the statute. *Texas* v. *Abilene Cotton, supra*. Recognition of such a defense would render the rate provisions of the Act a nullity and destroy the entire purpose served by the maintenance and filing of tariffs. For this reason, resort to Section 10701(a) of the Act to negate the requirements of Section 10761(a) would impermissibly permit the Act to destroy itself. *Texas* v. *Abilene Cotton, supra*.

Unlike the circumstances of *Hewitt-Robins*, the Act gives shippers pre-shipment protections to verify that a quoted rate is, in fact, a legal rate. Tariffs are public documents and are available for inspection at the offices of the Commission and the carrier. 49 U.S.C. § 10762. Moreover, during the time period in question, carriers could only change rates by publication on 30 days' notice. 49 U.S.C. § 10762(c)(3).[18] Primary Steel had ample time to ensure that the rates quoted to it by Quinn were legal. Shippers likewise have the post-shipment reparations remedy to challenge the lawfulness of a filed tariff rate. In addition, the ICC has broad enforcement powers over motor carriers to compel compliance with their tariffs, 49 U.S.C. §§ 11701, 11702, and the government may proceed civilly and criminally against carriers and shippers for failing to adhere to tariffs. 49 U.S.C. §§ 11902-11904. Finally, and not to dismiss the obvious, a carrier that does not file a negotiated rate

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[18] The ICC subsequently reduced this period in *Short Notice Effectiveness for Independently Filed Rates*, 1 I.C.C.2d 146 (1984), affirmed *sub nom. Southern Motor Carriers Rate Conference* v. *U.S.*, 773 F.2d 1561 (11th Cir. 1985).

has no legal remedy to recover it. Conversely, a shipper has no legal right to enforce it.

The additional remedy created by the court below is neither authorized nor necessary. In contrast to the objectives of *Hewitt-Robins*, such a result would encourage additional violations by reducing the incentive to file tariffs and negating the shipper's obligation to ascertain whether the rate is on file.

E. No Relevant Statutory Change Permits Equitable Defenses

The Motor Carrier Act of 1980 did not alter the requirements of Section 10761(a) or make any other relevant statutory change warranting departure from *Maxwell*. Nevertheless, in upholding the ICC's "reinterpretation" of the filed rate doctrine, the court of appeals relied on the general pro-competitive thrust of the reform legislation. (Pet.App. 12a).

The general purpose of the 1980 Act is insufficient to overcome the strict requirements and harsh results of the filed rate doctrine. As stated in *Square D*, *supra*, ". . . harmony with a general legislative purpose is inadequate for that formidable task." 476 U.S. at 420. If the reasons underlying the filed rate doctrine are no longer sound, it is up to the Congress to change that policy.[19]

This pronouncement takes on particular importance where, as here, Congress has carefully re-examined

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[19] In fact, legislation has been proposed to accomplish precisely the result reached below. See H.R. 3243 introduced September 12, 1989, by the Chairman of the House Committee on Public Works and Transportation which oversees the ICC and its administration of the Interstate Commerce Act. A similar bill in the last Congress died before action could be taken.

the law and provided a specific statutory framework under which shippers and carriers can conduct business. For example, the 1980 legislation relaxed entry requirements, 49 U.S.C. § 10922; broadened the sphere of contract carriage, 49 U.S.C. § 10923; allowed motor carriers to operate as both common and contract carriers without prior approval of their dual status, 49 U.S.C. § 10930(a); created a zone of rate freedom to allow carriers to raise and lower rates without ICC interference, 49 U.S.C. § 10703; enabled carriers to establish rates based on limited liability without prior ICC approval, 49 U.S.C. § 10730(b); and authorized continued antitrust immunity for collective ratemaking by motor common carriers, 49 U.S.C. § 10706(b).

The Commission has implemented the Act to provide carriers with greater flexibility within a regulated environment. It relieved motor contract carriers, on an industrywide basis from rate filing requirements;[20] allowed motor contract carriers to obtain permits to serve entire classes of unnamed shippers;[21] actively encouraged the discounting practices of motor common carriers;[22] and adopted a general rule allowing motor common carriers to respond quickly

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[20] *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150 (1983), affirmed *sub nom. Central & Southern Motor Freight Tariff Assn.* v. *United States*, 757 F.2d 301 (D.C. Cir. 1985).

[21] *Issuance of Permits Authorizing Industrywide Service*, 133 M.C.C. 298 (1983), appeal dismissed in *American Trucking Associations, Inc.* v. *United States*, 747 F.2d 787 (D.C. Cir. 1984).

[22] *Lawfulness of Volume Discount Rates, Motor Common Carriers*, 365 I.C.C. 711 (1982).

to market demand by individually filing reduced rates on one day's notice.[23]

Congress has provided the regulatory framework within which to achieve the goals of the national transportation policy. 49 U.S.C. § 10101. It did not, however, evince an intent to permit motor common carriers, shippers, or the ICC to subvert the statutory tariff adherence requirements. Significantly, continued adherence to the filed rate doctrine in no way infringes on the many reforms enacted.[24] Had Congress desired to carve exceptions into or eliminate these requirements, it would have done so. For example, the ICC may relieve motor contract carriers from rate filing requirements, 49 U.S.C. § 10761(b).[25] This is a plain indication that Congress never intended to authorize the Commission to relieve motor common carriers from the Act's tariff filing requirements. *Regular Common Carrier Conference, supra.* 793 F.2d at 379. Similarly, in the 1980 Household Goods Transportation Act, Pub.L. 96-454, 94 Stat. 2011, October 15, 1980, Congress authorized motor common carriers of household goods to quote binding

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[23] *Short Notice Effectiveness for Independently Filed Rates, supra.*

[24] The harmony between the filed rate doctrine and the 1980 reforms is illustrated by Congress' treatment of owner-operators engaged in food transportation. While Congress substantially eased their licensing requirements, 49 U.S.C. §§ 10922(b)(4)(E) and 10923(b)(5), it explicitly required that their rates be filed. 49 U.S.C. § 10762(g).

[25] Section 10761(b) existed prior to 1980, but was not implemented by the ICC to apply to all motor contract carriers until after the 1980 Act. *Exemption of Motor Contract Carriers from Tariff Filing Requirements, supra.*

estimates of charges pursuant to specific statutory and regulatory procedures. 49 U.S.C. § 10735(a)(1).[26] Common carriers may also transport property for federal, state, or local governments without charge or at reduced rates (which must be filed with the ICC either before or after shipment). 49 U.S.C. § 10721. Motor carriers may also provide transportation of recyclable materials without charge or at a reduced rate. 49 U.S.C. § 10733.

In view of the overriding legislative purpose served by filed rates, it cannot be claimed that Congress overlooked the requirements of Section 10761(a) when it enacted the Motor Carrier Act of 1980.[27] Congress has defined specific and limited circumstances in which the filed rate doctrine is not applicable. The decision below renders these provisions superfluous. To infer an intent to eradicate the filed rate doctrine is to ignore the plain language of the statute.

ICC implementation of its *Negotiated Rates* Policy is an attempt to accomplish that which Congress has declined. In every negotiated rates case considered, the Commission has found that collection of the lawful tariff charge is unreasonable where a negotiated, unfiled rate exists. Ironically, in *Negotiated Rates*, the Commission declared that it could not lawfully adopt a general rule giving effect to unfiled negotiated rates.

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[26] Initially codified at 49 U.S.C. § 10734 and renumbered to present section by Pub.L. 98-554, 98 Stat. 2852, October 30, 1984.

[27] In fact, it carved a specific exception into section 10761 with the addition of subsection (c) excluding business entertainment expenses as defined in 49 U.S.C. § 10751 from computation of a carrier's cost of service or rate base.

(JA 15). Its chosen course of doing so on a case-by-case basis is a flagrant attempt to circumvent the law.

The ICC Policy as implemented by the court of appeals turns the statute on its head. The circumstances giving rise to this and similar litigation are neither novel nor beyond the contemplation of the Act.[28] In its wisdom, Congress has provided a vast arsenal of remedies to uphold the integrity of filed rates to protect the public interest, and punish both shippers and carriers who attempt to circumvent the system. In view of this explicit statutory structure, it cannot be seriously argued that the statute likewise permits a shipper to retain the benefit of a rate declared by the same statute to be illegal. Nor can it be argued that it is inequitable to require a shipper to pay the lawful tariff charge. To the contrary, it is unfair to the remainder of the shipping public which pays lawful tariff rates and effectively subsidizes the beneficiaries of individual rate agreements. The dilemma now faced by recipients of secret rate agreements results from their own lack of diligence and ICC failure to enforce the rate provisions of the statute. The ICC *Negotiated Rates* Policy compounds and memorializes those omissions and, in the process, administratively nullifies the statutory requirement that common carrier rates be contained in a tariff.

[28] The ICC policy statement has spawned widespread conflict among the federal courts. (Pet.App.45a-53a). Since the filing of the petition for certiorari, the Ninth Circuit reached the same conclusion as the court below in *West Coast Truck Lines, Inc.* v. *Weyerhaeuser Co.*, 893 F.2d 1016 (1990). By order filed February 16, 1990, it stayed the issuance of its mandate pending resolution of this case. The Second Circuit issued a decision holding that referral is appropriate, but did not reach the effect to be given an ICC finding of unreasonableness. No. 88-9057, *Delta Traffic Services, Inc.* v. *Appco Paper & Plastics Corp.*, decided January 4, 1990, suggestion for rehearing *en banc* filed January 18, 1990.

CONCLUSION

The issue presented in this case is answered by the plain language of the statute as construed by the Court for over eight decades. If there is to be a change in the law, it is a task for Congress.

The court of appeals' decision is erroneous as a matter of law. Petitioners respectfully request that the judgment be reversed and the cause be remanded with directions that it be remanded to the district court for entry of judgment in favor of Maislin and instructions to rule on the request of prejudgment interest.

Respectfully submitted,

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